

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF REVENUE

In the Matter of the Denial of a
Tax Clearance Certificate to
Kira Burris and/or Marcoux Corner
f/d/b/a David T. Burris, d/b/a
Marcoux Corner, Route 1,
AND
Red Lake Falls, MN 56750
Minnesota Id. #4177161

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION

MEMORANDUM

The above-entitled matter came on for hearing before Administrative
Law
Judge Allan W. Klein on July 31, 1986, in Moorhead.

Appearing on behalf of the Department of Revenue was Patrick J.
Finnegan,
Attorney, Minnesota Department of Revenue, Centennial Office Building,
P.O.
Box 64451, St. Paul, Minnesota 55164. Appearing on behalf of the
Respondents
was David T. Jones, of the firm of Anderson & Associates, Attorney at Law,
P.O. Box 907, Grand Forks, North Dakota 58206.

The record in this matter closed on July 31, 1986, at the end of the
hearing.

This Report is a recommendation, not a final decision. The Commissioner
will make the final decision after a review of the record. He may adopt,
reject or modify the Findings of Fact, Conclusions, and Recommendations
contained herein. Pursuant to Minn. Stat. 14.61, the final decision
of the
Commissioner shall not be made until this Report has been made available
to
the parties to the proceeding for at least ten days. An opportunity must be
afforded to each party adversely affected by this Report to file
exceptions
and present argument to Thomas J. Triplett, Commissioner, Minnesota
Department
of Revenue, Centennial Office Building, 658 Cedar Street, St. Paul,
Minnesota
55145. Parties should contact Mr. Finnegan to ascertain the procedure
for
filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue to be determined is whether or not Kira Burris is entitled
to a

tax clearance certificate from the Commissioner so that Rec Lake County
could
issue her liquor licenses.

Based upon all of the proceedings herein, the Administrative Law Judge
makes the following:

FINDINGS OF FACT

1. On or about March 3, 1986, Kira Burris submitted to the Red Lake County Board of Commissioners a combination application for a Retailer's (On-sale) (Off-sale) Non-intoxicating Malt Liquor License. On or about that same date, she also submitted to the County Board an application for an Off-sale Intoxicating Liquor License.

2. On or about April 7, 1986, the Department informed the County Board and Ms. Burris that it had notified the County not to issue an off-sale beer license to Ms. Burris until a tax clearance certificate had been issued. The letter informed Ms. Burris of her right to a hearing.

3. On April 14, 1986, Attorney David Jones requested a hearing in connection with the Department's notifying the County not to issue an off-sale liquor license to Ms. Burris. A follow-up letter was sent on June 6, 1986.

4. On June 25, 1986, the Department issued a Notice and Order for Hearing in this matter, setting the hearing for July 31 in Moorhead.

5. The Applicant, Kira Burris, does not herself owe the state any delinquent taxes, penalties, or interest. Neither was she a director or officer of a corporation, nor a member of a partnership who had control, supervision or responsibility for filing returns or making payments for any taxes. Instead, she recently married David Burris who does owe the Department substantial amounts of money due to failure to pay sales taxes from a bar and cafe operation known as Marcoux Corner. Kira proposes to lease the facility from David, and operate it herself. The Department refuses to issue the certificate because it claims the lease is a "sham" arrangement entered into solely for the purpose of allowing David to do, indirectly through Kira, what he could not do directly himself. That is the real issue for determination in this proceeding.

6. Marcoux Corner is an on-sale and off-sale liquor establishment and a cafe. It has been in business for a number of years under varying ownerships, but for purposes of this proceeding, it is only the period since June of 1981 that is of interest.

7. In approximately June of 1981, David T. Burris assumed operation of Marcoux Corner. He failed to file sales tax returns and failed to pay sales taxes, and following a hearing on November 14, 1984, the Commissioner of Revenue ordered that sales and use tax permit number 4177161 issued to David T. Burris d/b/a Marcoux Corner be revoked, effective December 31, 1984.

8. On June 28, 1985, the Department notified Red Lake County that it

could not renew the license of David Burris d/b/a Marcoux Corner until a tax clearance certificate had been issued.

9. Shortly thereafter, on July 15, 1985, the Department issued a second letter to the County Board notifying it that there should be no issuance or transfer of a non-sale intoxicating liquor license to Mitchell S. Burris for the facility at Marcoux Corner. Mitchell Burris is the brother of David Burris. The County did not issue any licenses to him and he never operated the facility.

10. On July 24, 1985, David Burris filed a sales and use tax return on form ST-1 with the Department, identifying himself as manager of "Philion, Robert A.; Philion Bros Painters, Box 111, Red Lake Falls, Minnesota 56750". This was for the period of April through June of 1985, and was due on July 25, 1985. Although the form reports gross sales of \$15,553.92 and a total tax due of \$1,260.65 there was no payment enclosed with the form. The sales were reported for the account of the painting operation, but in fact they were incurred as the result of the operation of Marcoux Corner. Robert Philion is a friend of David Burris'. Burris informed the Department that he had leased the operation to Philion, but when asked for a copy of the lease, Burris never provided it.

11. On September 16, 1985, David Burris appeared at a criminal sentencing hearing in connection with a charge that he had operated Marcoux Corner without a sales tax permit subsequent to the December 31, 1984 revocation. As a result of that hearing, Burris was directed to make three payments of \$10,000 as partial restitution of his tax liability. As of July 31, 1986, he had made two \$10,000 payments.

12. On November 22, 1985, the Department issued a tax clearance notice to the Minnesota Department of Health in connection with the food, beverage, lodging and place of refreshment license of Robert A. Philion, d/b/a Marcoux Corner, indicating that the taxpayer was operating without a license.

13. As of July 31, 1986, David T. Burris, d/b/a Marcoux Corner owed the Department \$16,024.77 in back taxes, \$3,413.23 in penalties, and \$7,162.59 in interest, for a total of \$26,600.59.

14. Kira Burris is 24 years old. She was born and raised in the Mentor area, where she resided until 1983. In March of 1983, she moved to Dayton, Ohio, where she worked as an accounting clerk and an administrative assistant to a computer consultant. She remained in Ohio for two and one-half years, until she returned to Minnesota in September of 1985.

15. Between August of 1981 and January of 1983, Kira worked at Marcoux Corner as a bartender, cook, light bookkeeper and other assorted positions. She did not, however, have any responsibility for the filing of tax forms.

During that time, the operation employed three persons full-time and six persons part-time.

16. In September of 1985, upon her return to Minnesota, Kira Burris got a job at the Mentor Municipal Liquor Store as a bartender. She became engaged to David Burris in October of 1985, and they were married at Marcoux Corner in November of 1985.

17. David Burris is purchasing the Marcoux Corner facility on a Contract for Deed, which requires payments of \$800 per month in the summer time, and \$500 per month in the winter time. The difference in monthly payments reflects the seasonal nature of the business, which is impacted by Grand Forks residents fishing travels.

18. Kira and David Burris have not entered into any formal lease arrangement as yet. They believed that until the liquor licenses could be transferred, there was no reason to incur the legal fees for drawing up a

lease. They have, however, agreed On terms. The terms were to be \$800 per month for six months, to be followed a re-negotiation in light of the business experienced.

19. Kira Burris proposes to operate Marcoux Corner as a sole proprietor. She would manage the facility herself. Her husband would have no role whatsoever in the management of the Facility. At most, he might fill-in as a bartender as needed. He presently holds two full-time jobs, and it is their present intention that he continue in those jobs.

20. Kira has been interested in operating Marcoux Corner since her early employment there. There are not a large number of available jobs in Red Lake Falls.

21. Kira has not reviewed any records of prior business at the facility, nor is she familiar with the monthly income, gross receipts, or expenses incurred there. She has, however, talked with former employees about their returning to work there. She has never owned or leased a business in the past, nor has she operated one.

22. Kira had no knowledge that David was encountering financial difficulties at Marcoux Corner until sometime in 1985, when she was in Ohio. Her mother told her that David had run into trouble with taxes and that the facility had been closed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department of Revenue and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 270.72.

2. That the Department of Revenue has given proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.

3. That pursuant to Minn. Stat. 270.72, subd. 1, a political subdivision may not issue or renew a license for the conduct of a business if the Commissioner notifies the licensing authority that the applicant owes the state delinquent taxes, penalties, or interests. The delinquent taxes must exceed \$1,000 (reduced to \$500, effective July 1, 1986).

4. That David T. Burris, d/b/a Marcoux Corner, does owe state taxes,

penalties, and interest in excess of \$26,600. No administrative or court action contesting the amount or validity of the tax liability has been filed or served that is still currently pending.

5. That pursuant to Minn. Stat. 270.72, subd. 1, the Commissioner may issue a tax clearance certificate to Red Lake County only if the applicant does not owe the state any uncontested taxes, penalties, or interests.

6. That the Department has the burden of proving that Kira Burris' lease arrangement with David Burris would be a sham transaction so as to treat David Burris as the applicant for the licenses.

7. That the Department has proved by the preponderance of the evidence that the alleged lease of the Facility at Marcoux Corner to Kira Burris would be a sham to avoid sales and withholding tax liability.

8. That the above Conclusions are arrived at for the reasons set out in the Memorandum which follows, and which is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Revenue not issue a tax clearance certificate to Red Lake County on behalf of Kira Burris, d/b/a Marcoux Corner.

Dated this 2nd day of September, 1986.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tapes No. 4872 and 4878.

MEMORANDUM

The Minnesota Supreme Court has held that sales tax questions should be resolved by looking to the substance, and not just the form, of a transaction. *Midwest Federal Savings and Loan Association v. Commissioner of Revenue*, 259 N.W.2d 596, 599 (Minn. 1977). The Administrative Law Judge has concluded that the substance of this transaction is the continued operation of Marcoux Corner by David Burris. The reasons for this conclusion are set forth below.

On two separate occasions, David Burris attempted to have others operate the facility. One was his brother, another was a friend. Neither were arms-length transactions. In neither cause was a leased prepared. The

transaction with his wife, Kira, appears to be no different than those two.

Kira has had no experience in operating a business, let alone leasing a facility Involving relatively substantial sums of money. Although she began applying for permits no later than March of 1986, as of the date of the hearing in July, she still had not inspected any of the books and records of the business to acquaint herself with the level of receipts, expenses or income, It is reasonable to assume that any arms-length purchaser would have inspected such items with some care prior to even orally agreeing to a lease arrangement.

David Burris is faced with on-going Contract for Deed payments, as well as court ordered payments to the Department. He is presently holding down two full-time jobs in an attempt to meet those challenges. It seems unduly harsh to prevent him from realizing income from the facility, particularly when he still has to make payments on it. There is nothing in this record to suggest that the Department would object to a bona fida arms-length lease arrangement with another person so long as it appeared that the lease was not a sham to allow David to, in reality, resume operation of Marcoux Corner himself. David may have made a business judgment that Kira was the best qualified person for him to lease to, but the totality of the circumstances which have been demonstrated in the record suggest that his judgment will have to yield to the Department's legitimate concern that if the facility is to go back into operation, it is operated by someone other than David.

A.W.K.